STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED October 20, 2005
v	No. 254057 Oakland Circuit Court
DORIS SYLVESTER, Defendant-Appellant.	LC No. 2003-191117-FH

Before: Cavanagh, P.J., and Smolenski and Zahra, JJ.

PER CURIAM.

Defendant appeals as of right her jury convictions of first-degree home invasion, MCL 750.110a(2), and larceny less than $200, MCL 750.356(5), for aiding and abetting her brother and codefendant, Dan Beavers, in stealing a weed trimmer from the side of a home and a carpet cleaner from the attached garage of another home, by driving Beavers from home to home so he could easily transport the stolen property and later split the profits with her. We affirm.

On appeal, defendant claims that she was denied the effective assistance of counsel. We disagree. Because a hearing was not conducted pursuant to *People v Ginther*, 390 Mich 436, 443-444; 212 NW2d 922 (1973), our review is limited to mistakes apparent on the record.

To establish ineffective assistance of counsel, a defendant must show that his counsel's performance fell below an objective standard of reasonableness and there is a reasonable probability that, but for counsel's caused errors, the outcome of the trial would have been different. See *People v Toma*, 462 Mich 281, 302-303; 613 NW2d 694 (2000). Defendant first claims that her counsel should not have stipulated to her codefendant's identity as the person who took the carpet cleaner out of the garage. But, a lawyer does not render ineffective assistance by conceding certain points at trial; indeed, only a complete concession of guilt constitutes ineffective assistance of counsel. *People v Emerson (After Remand)*, 203 Mich App 345, 349; 512 NW2d 3 (1994). Here, trial counsel focused on the mens rea element of the case, i.e., whether defendant intended to assist in the larceny and home invasion, rather than on the criminal acts themselves in light of the eyewitness testimony and Beavers' own admission that he committed the crimes. This claim is, thus, without merit.

Next, defendant argues that her counsel should not have called her codefendant, Beavers, as a witness at trial. We disagree. This Court neither substitutes its judgment for that of counsel regarding matters of trial strategy, nor assesses counsel's competence with the benefit of

hindsight. *People v Matuszak*, 263 Mich App 42, 58; 687 NW2d 342 (2004). Decisions as to what evidence to present and whether to call or question witnesses are presumed to be matters of trial strategy. *People v Dixon*, 263 Mich App 393, 398; 688 NW2d 308 (2004). Here, defendant claims that calling Beavers did not constitute *sound* trial strategy. But, Beavers was the only person who could corroborate defendant's version of the events, i.e., that she did not know of his intent to steal. Beavers testified that he told defendant that he needed her to drive him through their neighborhood so he could find items to repair and sell, and he also tried to show that defendant was unaware of his crimes by claiming that defendant drove out of his view when he made his stops. In light of the circumstances, this claim is without merit. And, for this same reason, defendant's claim that her counsel was ineffective for failing to object when the prosecutor elicited that Beavers had pled guilty to the charges is without merit.

Next, defendant argues that her counsel was ineffective for failing to move to suppress Beavers' custodial statement as violative of the Confrontation Clause. We disagree. In *Crawford v Washington*, 541 US 36, 59 n 9; 124 S Ct 1354; 158 L Ed 2d 177 (2004), our United Supreme Court ruled that the Confrontation Clause is not violated where a hearsay declarant is available for cross-examination at trial. Beavers testified during defendant's trial and therefore was available for cross-examination. Consequently, the admission of Beavers' custodial statement did not violate the Confrontation Clause, so any objection on that basis would have been futile. An attorney is not ineffective for failing to make a futile objection. *People v Fike*, 228 Mich App 178, 182; 577 NW2d 903 (1998).

However, the admission of Beavers' custodial statement violated the hearsay rule. Unless a hearsay statement falls under an exception in the rules of evidence, it is inadmissible. MRE 802. Beavers' statement constituted hearsay and the "statement against interest" exception, MRE 804(b)(3), does not apply because the declarant, Beavers, was available and did testify at trial. Therefore, trial counsel erred in not objecting to this evidence. However, in light of the overwhelming evidence of defendant's guilt, it is not reasonably probable that the proceedings would have been different but for the admission of the custodial confession. See *Toma*, *supra* at 302. In sum, defendant has failed to overcome the presumption that she received the effective assistance of counsel. See *People v Rockey*, 237 Mich App 74, 76; 601 NW2d 887 (1999).

Affirmed.

/s/ Mark J. Cavanagh
/s/ Michael R. Smolenski
/s/ Brian K. Zahra